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September 25, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capacity; Docket No. 98-147

Dear Ms. Salas:

Enclosed for filing in the above captioned matter, please find an original and four (4) copies of Comments of Hyperion Telecommunications, Inc. on Notice of Proposed Rulemaking.

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the envelope provided. If you have any questions regarding this filing please contact me at 202/424-7791.

Sincerely,

Robert V. Zener

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capacity	)	

COMMENTS OF HYPERION TELECOMMUNICATIONS, INC. ON NOTICE OF PROPOSED RULEMAKING

Hyperion Telecommunications, Inc. ("Hyperion"), through undersigned counsel, hereby submits its Comments on the Notice of Proposed Rulemaking released August 7, 1998, on various issues relating to deployment of wireline services offering advanced telecommunications capability.

BACKGROUND AND STATEMENT OF INTEREST

Hyperion is a diversified telecommunications company whose affiliates are providing or preparing to provide facilities-based local exchange service in twelve states. Hyperion, through its affiliated networks, is a leading provider of integrated local telecommunications services over state-of-the-art fiber-optic networks in selected markets in the United States. Hyperion affiliates provide services to small, medium, and large businesses, and government and educational end users and resellers, including IXCs. Hyperion affiliates currently offer local switched dial tone, long distance, dedicated access, enhanced services and traditional access services to IXCs and large customers. Enhanced data services currently offered by some Hyperion affiliates include

frame relay, ATM data transport, business video and conferencing, private-line data interconnect service and LAN connection and monitoring services. Hyperion affiliates also plan to become Internet service providers in their markets.

In order to compete effectively with the incumbent carriers, Hyperion affiliates need nondiscriminatory interconnection to the incumbents' local networks. Hyperion is concerned that allowing incumbents to provide advanced services through affiliates that are not in reality separate would undermine nondiscriminatory interconnection and thereby undermine the ability of Hyperion and other competitive carriers to provide advanced data services.

DISCUSSION

I. An Advanced Services Affiliate is a "Successor or Assign" Subject to Section 251(c) if the Incumbent Transfers to It Any Significant Asset Used in the Incumbent's Local Exchange Business, Including the Right to Use the Incumbent's Brand Name.

Section 251(h) extends the competitive open-access obligations of section 251(c) to any entity that becomes a "successor or assign" of an incumbent after the date of enactment. "[T]he words 'successors' and 'assigns' have different meanings." Southern Patrician Associates v. International Fidelity Insurance Company, 381 S.E.2d 98, 108 (Ga. App. 1989). The term "successor" involves a fact-specific inquiry, focusing on whether one company has succeeded to the obligations of another. Howard Johnson Co. Inc. v. Detroit Local Joint Executive Board, etc., 417 U.S. 249, 262 n.9 (1974). The term "assign" describes a party who has received an assignment of property or contract rights. Restatement of Contracts Second, § 323, Comment b. Since section 251(h) extends to any successor "or" assign of the incumbent, an advanced services affiliate may be an "assign" even though it is not a "successor" of the incumbent. See Southern Patrician Associates, supra, 381 S.E.2d at 107.

Any affiliate receiving an assignment of significant assets utilized by the incumbent in its provision of local telephone exchange service is an "assign" within the literal meaning of that term. The accepted definition of "assigns" is "assignees: those to whom property is, will, or may be assigned." Black's Law Dictionary (6th ed. 1990). There is nothing in § 251(h) to show that Congress intended anything other than the accepted definition of "assigns" when it used that term in § 251(h).

Authorization of the affiliate to use the incumbent's brand name represents the assignment of a significant business asset, making the affiliate an "assign" under § 251(h). "Trade names . . . are property interests that may be protected under both state and federal law." Dial-a-Mattress Operating Corp. v. Mattress Madness, Inc., 841 F. Supp. 1339, 1345 (E.D.N.Y. 1994); Philadelphia Orchestra Ass'n v. The Walt Disney Co., 821 F. Supp. 341, 350 (E.D.Pa. 1993). This Commission has recognized the crucial significance that "brand name assets" play in the business of providing local exchange and exchange access services. Applications of NYNEX Corporation, Transferor and BellAtlantic Corporation, Transferee. For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 12 FCC Rcd 19985, ¶ 105 (1997).

Moreover, even if the focus is on the term "successors" rather than "assigns," an affiliate receiving an assignment of significant assets used in the incumbent's local exchange business is within the coverage of § 251(h). The Supreme Court has stated that whether a company is a "successor" requires analysis of the interests of the parties and the policies of the law involved "in light of the facts of each case and the particular legal obligation which is at issue." Howard Johnson Co. Inc. v. Detroit Local Joint Executive Board, etc., supra, 417 U.S. at 262 n.9. Where the facts show that the assigned assets are significant in the conduct of the incumbent's local

exchange business, the policies of § 251 are served by imposing "successorship" obligations on the affiliate.

The basic policy of § 251(c) is to foster local competition by preventing the incumbent from using its bottleneck control over the local network to exclude competitors. An advanced services affiliate that is able to utilize the incumbent's brand name will be regarded by consumers as part of the same company. It will have an automatic advantage in marketing to consumers who already use the incumbent for local service and want advanced services as part of a single package sold by one telephone company. If the local market were truly open to competition, that advantage could be matched by competing carriers offering their own packages of conventional circuit-switched local service combined with advanced data service. But the local markets are not yet open to competition. That is clear from the fact that no incumbent BOC has yet complied with the competitive checklist of section 271. As long as the incumbent companies are utilizing their control over the local network to dominate the local exchange market for conventional circuit-switched voice services, any advanced data affiliate that can link itself to the incumbent through the incumbent's brand name will be able to "piggy-back" on the incumbent's continuing bottleneck control of the local network – extending the incumbent's control in clear violation of the policy of § 251(c)

Any provision of advanced data services through ILEC affiliates that are not subject to § 251(c) open access obligations involves significant risk of undermining the pro-competitive policies of the Act. Inevitably, the affiliates will receive significant equity financing from the incumbent or its holding company and will be operated for the benefit of same shareholders. Moreover, the incumbent will have ample incentive to discriminate in favor of the affiliate, and

-- as the recent history of difficulty in implementing local exchange competition shows -- where incentives to discriminate exist, enforcement of open access and non-discrimination obligations may lag significantly.

In addition, as time passes, an increasingly large portion of the local exchange network will be devoted to advance services – and the affiliate, under the Commission's proposal, will obtain with ILEC financing a growing portion of the network free of any open access obligation. The ultimate danger is progressive erosion of the competitive goal of § 251.

Given these dangers, there should be no departure from a strict construction of the "successors or assigns" coverage of § 251(h), and any use of ILEC affiliates should be carefully circumscribed.

II. There Should Be No *De Minimis* Exception for Transfers of Network Equipment.

The Commission has asked for comment on whether there should be a de minimis exception for transfers of network equipment, possibly limited to equipment already owned or ordered by the incumbent. NPRM ¶ ¶ 108, 109. The apparent purpose of such an exception would be to enable transfer to the affiliate of equipment already owned or under order by the incumbent.

A de minimis exception would serve no legitimate purpose. As to equipment acquired in the future, there would be no reason to allow equipment destined for the affiliate to be funneled through the incumbent, even on a de minimis basis. If the incumbent's decision is to operate its advanced services through a separate affiliate, there is no reason why the separate affiliate itself cannot purchase the equipment.

Nor does a de minimis exception serve any legitimate purpose as applied to equipment that the incumbent has already purchased or ordered. The incumbents have argued that giving competitors open access to advanced service facilities "reduce[s] their incentive to invest in these new facilities." NPRM ¶ 10. But that argument applies only to equipment purchased in the future. As to network facilities already purchased or under order, the incumbents have already made their investment decisions, knowing that the open access obligation of § 251(c) applies. There is thus no reason for the Commission to deviate from its prior ruling that transfers of network facilities to an affiliate render that affiliate an incumbent under § 251(h). Non-Accounting Safeguards Order, 11 FCC Rcd 21905, ¶ 309 (1996).

The distinction the NPRM proposes between de minimis transfers and "wholesale" transfers – allowing one and disallowing the other – creates the prospect of ambiguity, confusion and opportunities for evasion. Since there is no good reason for allowing an exception -- regardless of the size of the transfer or when the equipment was purchased -- the Commission should adhere to its present rule that transfers of network equipment, without exception, subject to transferee affiliate to § 251(c) open access obligations.

III. Modification of LATA Boundaries Is Permissible Only Where It Would Have Been Allowed under the AT&T Consent Decree. Modification Is Not Allowable To Provide High-Speed InterLATA Access to Network Access Points in other LATAs.

Section 3(25) sets forth no standards for modification of LATA boundaries. That does not mean, however, that the Commission has standardless discretion to modify LATAs whenever it believes such modification might represent desirable policy. To the contrary, there are at least two features of the Act which support signficant limitations on the scope of allowable LATA modifications.

First, the LATA concept – and the LATAs themselves– derive from the AT&T Consent Decree, which is specifically referenced in § 3(25). As the Commission recognizes, the District Court that issued the AT&T Consent Decree had a procedure for considering modification requests, and approved several modifications. Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, 12 FCC Rcd 10646, ¶ ¶ 3-8 (1997) ("LATA Boundary Decision"). This history supports the conclusion that, as part of incorporating the LATA structure established by the AT&T Consent Decree, Congress intended to incorporate the standards followed by the District Court in ruling on requests for modifications of LATA boundaries under the Consent Decree. The Commission itself has cited the standards followed by the District Court in determining whether to approve requested LATA modifications. Petitions for LATA Association Changes by Independent Telephone Companies, 12 FCC Rcd 11769, ¶ 12 (1997).

Second, the LATA boundaries are a key element of § 271's restriction on BOC provision of interLATA service. Congress strictly limited the Commission's discretion in allowing exceptions to § 271. Section 10(d) prohibits the Commission from forbearing to apply the requirements of § 271 until they have been fully implemented; and § 271(g) has a limited definition of "incidental interLATA services" exempt from those requirements. In light of these limitations, the Commission was clearly correct in concluding that it could not grant LATA modification requests that are "functionally no different" from requests to forbear from applying § 271 to the provision of particular types of services. NPRM ¶ 82. The Commission's position is also consistent with the concern expressed by the District Court that LATA modification not lead to "piecemeal dismantling" of the Consent Decree restrictions on BOC provision of

interLATA service. LATA Boundary Decision, ¶ 8, quoting United States v. Western Electric Company, Inc., No. 82-0192, slip op. at 4 (D.D.C. May 18, 1993). In essence, § 271 has replaced the Consent Decree, and the LATA modification provision of § 271, like the parallel Consent Decree modification procedure, was not intended to allow "piecemeal dismantling" of interLATA restrictions.

Under the AT&T Consent Decree, the District Court approved modification of LATA boundaries in basically two situations. First, the District Court approved LATA modifications for "traditional local telephone service between nearby exchanges," under flat-rate non-optional plans, where "the competitive effects were minimal and a sufficient community of interest across LATA boundaries was shown." LATA Boundary Decision, ¶¶ 7, 8 (summarizing District Court decisions).

Second, the District Court approved LATA modifications for independent telephone companies seeking to upgrade their networks in a manner that would require routing traffic through a BOC switch in a different LATA. Petitions for LATA Association Changes by Independent Telephone Companies, 12 FCC Rcd 11769, ¶ 5 (1997) (summarizing District Court decisions). Since this type of relief was for the benefit of independent telephone companies, it involved no danger of undermining the restrictions on BOC provision of interLATA service.

Under these tests, the Commission's proposal to allow LATA boundary modification to enable provision of advanced services on an intral ATA basis to a single school district straddling LATA boundaries (NPRM ¶ 86) is similar to the "community of interest" situation in which the District Court authorized LATA boundary modifications. Moreover, in such a

situation, no competitive injury is likely, and no dismantling of the basic § 271 interLATA restriction is involved.

However, LATA boundary modifications to enable a BOC to reach network access points in another LATA would present an entirely different situation. We estimate that approximately 43% to 78% of persons residing in the United States have access to the Internet at something less than DS3 connection.[1] Granting the relief requested would be more than simply fine-tuning particular geographical boundaries to recognize particular communities of interest. Instead, it would allow broad BOC participation in providing a particular type of interLATA service. Regardless of what the policy arguments may be for or against that result, Congress specifically listed – in § 271(g)'s definition of "incidental interLATA services" – the types of interLATA service it wanted to exempt from the overall restriction of § 271. The proposed action would add to the list of interLATA services exempt from § 271. That would be an impermissible use of § 3(25).

Moreover, such relief is not needed. If there is demand in a particular area for high-speed access to an out-of-LATA network access point – whether that demand comes from the private sector or from public subsidies – there is no reason why that demand cannot be fulfilled

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[1] In its petition in No. 98-26, US West includes a map purporting to show the cities in the United States in which major backbone providers offer DS3 connections. The total population of these cities is 58,563,128 or approximately 21.9% of the population of the United States of 267,368,000 persons. By this calculation, 78% of persons in the United States lack local DS3 connection. When the total population of any MSA is considered in cases where one of these cities is part of such an area, the total population of areas with DS3 service is 153,912,328 or 57.5% of the United States population. Even under this more expansive measure, approximately 43% of persons in the United States lack local DS3 connection. (Population figures taken from the *State and Metropolitan Area Data Book 1997-1998,* U.S. Bureau of the Census (5th Edition) Washington, DC, 1998, pp. 172-177.)

by one of the existing IXCs. Indeed, if IXCs have not recognized a demand for such high-speed access yet the BOCs are seeking to provide it, one may well question whether a cross subsidy is involved.

The market for high-speed access interLATA transmission is exploding in this country, and several carriers are building networks to attempt to meet this demand. It is understandable that the BOCs are anxious to participate in this market, as they are for other aspects of the interLATA market. But § 271 establishes a process for BOC entry into the interLATA market – a process which, by requiring the BOCs to cooperate in opening local markets to competition, will benefit consumers in all areas of the country. The BOCs must comply with § 271 before they are authorized to provide high-speed interLATA access to the Internet.

Respectfully submitted,

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September 25, 1998

CERTIFICATE OF SERVICE

I, Teri Lee Amaya, hereby certify that on this 25th day of September 1998, copies of the foregoing Comments of Hyprion Telecommunications, Inc. were hand delivered to those parties marked with an asterisk. All others were served by first class mail.

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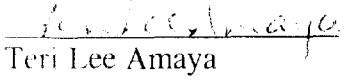
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